IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

JOHN McNEAL,

Petitioner,

vs.

PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Table of Authorities	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
(a) THE SUSPENSION OF PAROLE	7
(b) THE APPEAL BAIL REVOCATION	9
(c) THE DISMISSAL OF THE APPEAL BY THE COURT OF APPEAL	10
CONCLUSION	12
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Bitter v. United States, 389 U.S. 515	10
In re Eiseman, 72 Cal.App. 622	10
Mays v. Nelson, 464 F.2d 585	7
Molinaro v. New Jersey, 396 U.S. 365	11
Morrissey v. Brewer, 480 U.S. 471	8, 9
People v. Vickers, 8 Cal.3d 451	8
Constitution	
United States Constitution Fourteenth Amendment	3
Statute	
28 U.S.C.A. Section 1257(3)	2

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby prays for a Writ of Certiorari to review a judgment of the Supreme Court of the State of California. This judgment affirmed the judgment of the California Court of Appeal as to petitioner.

OPINIONS BELOW

No opinions in this matter were prepared by either the Court of Appeal or the Supreme Court of the State of California.

JURISDICTION

On April 10,1974,the Supreme Court of the State of California denied petitioner's petition for a Writ of Mandamus/prohibition to compel the Court of Appeal to retain jurisdiction over his appeal. This Court has jurisdiction to review this matter under 28 U.S.C.A., Section 1257 (3). The questions sought to be presented before this Court were raised at the first available instance in the Courts below.

QUESTIONS PRESENTED

The following question is presented for determination by this Court:

Whether an appellate Court can dis-

miss petitioner's appeal on the ground that he is a fugitive,when such determination itself is based on the prior suspension of petitioner's parole on an unrelated case without notice of hearing and on the prior revocation of petitioner's appeal bond without notice of a hearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment,United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty,or property without due process of law."

STATEMENT OF THE CASE

On January 21,1966,petitioner was sentenced to State Prison in California after a felony conviction. The Department of Corrections fixed his term on

February 8,1966,at five years with a discharge date of February 8,1971. He was paroled on August 1,1968.

On July 27,1970,petitioner was arrested for possession of heroin for sale. Petitioner's parole was suspended by the Adult Authority on January 22,1971,but petitioner was on bail on the alleged offense and remained at liberty on a suspended status.

On September 6,1972,petitioner was found guilty of the offense and sentenced to State Prison. As part of the plea bargain in the case, petitioner was admitted to bail,pending the outcome of the appeal,in the amount of $5,000.00. The Notice of Appeal was filed and the bail posted on September 6,1972,the same day. After posting bail on appeal,petitioner's parole agent placed him in custody by de-

livering him to the Sheriff. The Sheriff, however,released petitioner on the same day because the Adult Authority had not placed a parole "hold."

Petitioner's bail on appeal was revoked in an ex parte proceeding without notice to petitioner on October 18,1972. On October 27,1972,the Adult Authority 'suspended' petitioner's parole a second time and ordered his return to prison.

On February 22,1973,petitioner timely filed his Opening Brief with the Court of Appeal. On August 16,1973,the respondent in the appeal moved to dismiss the appeal on the ground that petitioner was a fugitive from justice. Petitioner opposed this motion and submitted a brief to that effect. On September 20,1973,the Court of Appeal entered its order dismissing the appeal unless

petitioner surrendered himself to the Superior Court by September 30,1973.

Petitioner thereupon filed a petition for a Writ of Prohibition/Mandamus with the Supreme Court of the State of California to compel the Court of Appeal to retain jurisdiction and hear the appeal on its merits. This petition was denied on April 10,1974.

The issues raised in this petition were first raised by petitioner in his opposition to respondent's Motion to Dismiss the Appeal before the Court of Appeal. Petitioner raised the points again in his request for relief from the Supreme Court of California. Those parts of the respective briefs that raised the issue that petitioner was being denied due process of law as guaranteed by the Federal Constitution are attached hereto.

REASONS FOR GRANTING THE WRIT

The basic issue this Court is asked to review is whether the State,through its agents,can deprive petitioner of his parole without notice of a hearing and then,using the first deprivation as the justification,deprive petitioner of bail on appeal without notice of a hearing and then,using the first two deprivations as the justification,declare petitioner a fugitive and dismiss his appeal.

(a) THE SUSPENSION OF PAROLE

On January 22,1971,and again on October 27,1972,petitioner's parole was suspended without notice of hearing. The effect of the suspension was to refix petitioner's term at the maximum and to stop time from running. In MAYS v.NELSON, 464 F.2d 585 (1972),the Federal Court noted that the decision to suspend parole

in California is tantamount to final revocation. Petitioner,in the case at hand, received no notice of the suspension hearing,did not appear,and no provision was made for petitioner to get a copy of the parole agents' report on which the suspension was based.

At the time of the second suspension of petitioner's parole on October 27, 1972,MORRISSEY v.BREWER,480 U.S.471 (1972) was in effect. Petitioner contends that the procedure used by California,that is the 'suspension' of parole violates the rule set out in MORRISSEY v.BREWER with respect to due process protections. Moreover,petitioner contends that the Supreme Court of California's interpretation of the MORRISSEY decision is unconstitutional. In PEOPLE v.VICKERS,8 C.3d 451,460 (1972), the California Supreme Court held that

MORRISSEY does not apply to revocation of parole while the parolee is still at large. Petitioner contends that the MORRISSEY protections should apply both to parolees who are in custody as well as those free on bond. For these reasons,the petitioner contends that his parole was 'suspended' without due process of law and that technically he is not a fugitive as far as the parole is concerned. Moreover,since the term of his parole was to expire on February 8,1971,the unconstitutional suspension that occurred on January 22,1971, could not refix his term at the maximum or stop the time from running. Therefore,the Adult Authority had no jurisdiction over him when it sought to suspend the parole again on October 27,1972.

(b) THE APPEAL BAIL REVOCATION

Petitioner's bail on appeal was re-

voked on October 18,1972,in an ex parte proceeding without notice to petitioner. The revocation of bail on appeal also violated a plea bargain. In California,a person is not entitled to a notice and hearing with respect to revocation of bail on appeal. IN RE EISEMAN,72 Cal.App.622 (1925). This rule is in conflict with the Federal rule as set out in BITTER v.UNITED STATES,389 U.S.515 (1967), wherein the United States Supreme Court condemned a bail revocation without a hearing or statement of reasons. While the BITTER decision was rendered in a case involving a Federal trial Court,its reasoning is applicable to this case.

(c) THE DISMISSAL OF THE APPEAL BY THE COURT OF APPEAL

While it is generally recognized that an appeal can be dismissed when an appell-

ant escapes from custody (MOLINARO v.NEW JERSEY,396 U.S. 365 (1970),this is not the situation in the case at hand. The petitioner has not escaped from custody. He was released from custody by the Sheriff. He has,however,refused to submit to an illegal assertion of authority by the State and has sought instead to have this action reviewed.

The decision by the Court of Appeal to dismiss petitioner's appeal was based on the ground that petitioner was a fugitive. But this determination of petitioner's status as a fugitive was itself the product of the 'suspension' of petitioner's parole and the revocation of his bail. In short,action of the Court of Appeal was based on the prior revocation of bail by the trial court,which itself was based on the 'suspension' of petitioner's parole by the Adult Authority.

The Petitioner contends that Court of Appeal's decision is in error because it is based on two prior unconstitutional acts by the Adult Authority and the trial court.

CONCLUSION

The State seeks to turn two wrongs into a right. The two wrongs are the suspension of petitioner's parole without due process and revocation of his appeal bond without due process. Based on these two actions petitioner's appeal was dismissed. Petitioner contends that the State cannot use the prior illegalities of its agents as a justification for its own decision.

FOR THESE REASONS,the requested Writ of Certiorari should issue.

Respectfully submitted,

RUSSELL PARSONS

WALTER L. GORDON, JR.,

and

WALTER L. GORDON, III

Attorneys for Petitioner

ORDER DENYING ALTERNATIVE WRIT

L.A. No. 30196

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

McNEAL

v.

COURT OF APPEAL, 2ND APPELLATE DISTRICT

Petition for writ of mandamus/prohibition DENIED.

SUPREME COURT
FILED
APR 10 1974
G. E. LISHEL, Clerk

Deputy

Wright
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

JOHN McNEAL,
Defendant and Appellant.

2D CRIM. 22800
S.Ct.No. A 169648

ORDER DISMISSING APPEAL

FILED
SEP 20 1973
CLAY ROBBINS, JR. Clerk
Deputy Clerk

It appearing that defendant John McNeal is a fugitive from justice, it is ordered that the appeal of John McNeal be dismissed unless he surrenders to the Superior Court of Los Angeles County within ten (10) days from this date.

Compl
PRESIDING JUSTICE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN MC NEAL,

Petitioner

v.

THE CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT,

Respondent.

(THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest)

NO.

Crim. No. 22800

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

I

INTRODUCTION

In the respondent court the real party in interest sought the dismissal of the petitioner's appeal on the express grounds that the court lacked jurisdiction over the appeal since he was a "fugitive" from justice. That the justice the People were referring to was that of the Adult Authority was made clear by their proposed order that the appeal be dismissed unless petitioner surrender himself to the Parole Agent. The respondent on the other hand denominated petitioner as a fugitive from justice unless he surrenders to the Superior Court of Los Angeles County. Analysis of the facts and the law on the issue leads inescapably to the conclusion that petitioner is not a fugitive from justice in either sense.

The action of the Adult Authority with regard to

petitioner's parole status when viewed in the light of the Due Process Clause of the Fourteenth Amendment and the Resolutions and Manuals promulgated by that Agency is obviously in contravention of both these standards and that authority either presently has no jurisdiction over petitioner or assuming argued that it has jurisdiction, has no present right to deprive petitioner of his provisionalliberty by incarceration.

The action of the Superior Court when it revoked petitioner's bail on appeal was void as in excess of that Court's jurisdiction as conferred by statute, and, being ex parte without notice of hearing was clearly void as a violation of the Due Process Clause. Further it appears that action of the Superior Court was predicated on petitioner's parole status and had it been aware of the true nature of that status, the petitioner would still be on bail on appeal.

It appears that the action of the Adult Authority and its agents was basis for the action taken by the Superior Court. The Superior Court action seems to be the basis for the action in the respondent Court of Appeal. However neither Court held a factual hearing to determine the existence or non-existence of the predicate of their actions.

Analysis of that predicate status demonstrates that petitioner is not a fugitive and the respondent therefore should not dismiss his appeal but rather decide it on its merits.

II

DISCUSSION

1. The Adult Authority has no jurisdiction over petitioner since its action purporting to "suspend" his parole

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JOHN MC NEAL, JUANITA MUFFELLETO and HAZEL MARIE SUTTON, Defendants and Appellants.	2D CRIM. NO. 22800 OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL

I

INTRODUCTION

Respondent requests this Honorable Court to dismiss the appeal herein since it is alleged this Court lacks jurisdiction because appellant is a fugitive from justice. The cases cited by respondent are all clearly distinguishable from the case at bar. In each of the cited cases, the appellant was in flight from the consequences of the very judgment from which he was attempting to appeal. In the case at bar however appellant is not in flight from the lawful authority of the Court below since the last valid order of that Court was its order placing appellant on bail pending appeal. Secondly, in all the cases cited there were no co-appellants and the cause was therefore decided when dismissed since it was unnecessary to consider the merits of the appeal. Here this Honorable Court will necessarily have to decide the issues on appeal on their merits on behalf of the co-appellants. Oral argument is set thereon on October 11, 1973.

Moreover the recent United States Supreme Court case of Molinaro v. New Jersey, 396 U.S. 365 [24 L.Ed. 2d 586, 90 S. Ct.

498] clearly indicates that the issue is not one of jurisdiction but one of equity. That Court said:

> "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims."
> 396 U.S. at p. 366

Here it is urged that the equity in the case at bar favors appellant and that this Court has jurisdiction to decide the case on the merits and should do so.

Appellant herein is not flouting the authority of this or any other Court. Rather, appellant is resisting the threat of invalid conduct on the part of the California Adult Authority and its agents. Since the disposition sought by Respondent is based on the parole status of appellant this Honorable Court should not grant respondant's motion without a careful analysis of that status. It is urged that any such analysis will result in denial of the motion.

An analysis of the parole status of appellant requires

a consideration of the legal consequences of three separate events. The first is the action of the Adult Authority on January 22, 1971. The second is the action of appellant's parole agent on October 12, 1972. Third is the action of the Court when it revoked bail. Each event must be considered in the light of the standards required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The actions of the Administrative Agency and its agents must be considered in the somewhat dimmer light of the Resolution and Manuals it has adopted and by which it is therefore bound to proceed.

The action of the Court below must be considered in the light of Title 10, Article 8 of the Penal Code entitled, "Recommitment of the Defendant, After Having Given Bail or Deposited Money Instead of Bail."

II

DISCUSSION

1. The suspension of appellant's parole in January 1971 was void.

A. Due Process

The Due Process Clause of the Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property without due process of law."

In Green v. McElroy, 360 U.S. 474, 3 L.Ed. 2d 1377; 79 S.Ct. 1400, the United States Supreme Court had a case in which there was an administrative revocation of a security clearance by procedures similar to those used by the Adult Authority in suspending appellant and redetermining his sentence. There were no witnesses called by the decision making body and confidential reports were used which

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JOHN MC NEAL, JUANITA MUFFELLETO and HAZEL MARIE SUTTON, Defendants and Appellants.	2D CRIM. NO. 22800 DECLARATION IN SUPPORT OF MOTION TO RESIST DISMISSAL

Declaration of Howard E. Beckler in support of opposition to Respondent's motion to dismiss appeal.

I, Howard E. Beckler, am an attorney duly licensed to practice law in the State of California. I declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

1. That I was the attorney of record for appellant in the Court below.

2. That Appellant's parole term on his previous conviction was due to expire in February 1971.

3. That bail on appeal was part of the plea bargain in the case in the Court below.

4. That I was in Court when Appellant's parole agent placed him in custody by delivering him to the bailiff after bail on appeal was posted pursuant to the plea bargain.

5. That Appellant was released by the sheriff when no written hold was placed against Appellant by the Adult Authority.

6. That I was informed by telephone at a subsequent time that pursuant to the request of a Deputy District Attorney which

notice to Appellant or Declarant, the Court below revoked Appellant's bail by an ex parte order.

September 17, 1973.

EDWARD E. BECKLER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

JOHN McNEAL,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

APPENDIX A

ORDER DENYING ALTERNATIVE WRIT

L. A. No. 30196

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

McNEAL

v.

COURT OF APPEAL,
2ND APPELLATE DISTRICT

Petition for writ of mandamus/prohibition

DENIED.

Supreme Court
F I L E D
Apr 10 1974
G. E. Bishel, Clerk

Deputy

/s/ Wright
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	2D CRIM. 22800 S. Ct. No. A 169648
Plaintiff and Respondent,	ORDER DISMISSING APPEAL
vs.	FILED
JOHN McNEAL,	SEP 20 1973
Defendant and Appellant.	Clay Robbins, Jr., Clerk Deputy Clerk

It appearing that defendant John McNeal is a fugitive from justice, it is ordered that the appeal of John McNeal be dismissed unless he surrenders to the Superior Court of Los Angeles County within ten (10) days from this date.

/s/ Roth
PRESIDING JUSTICE

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN MC NEAL,	)	NO.
	)	
Petitioner	)	Crim. No.
v.	)	22800
	)	
THE CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT,	)	
	)	
Respondent.	)	
	)	
(THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest)	)	
	)	

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The action of the Adult Authority with regard to petitioner's parole status when viewed in the light of the Due Process Clause of the Fourteenth Amendment and the Resolutions and Manuals promulgated by that Agency is obviously in contravention of both these standards and that authority either presently has no jurisdiction over petitioner or assuming argued that it has jurisdiction, has no present right to deprive petitioner of his provisional liberty by incarceration.

The action of the Superior Court when it revoked petitioner's bail on appeal was void as in excess of that Court's jurisdiction as conferred by statute, and, being ex parte without notice of hearing was clearly void as a violation of the Due Process Clause. Further it appears that action of the Superior Court was predicated on petitioner's parole status and had it been aware of the true nature

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COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

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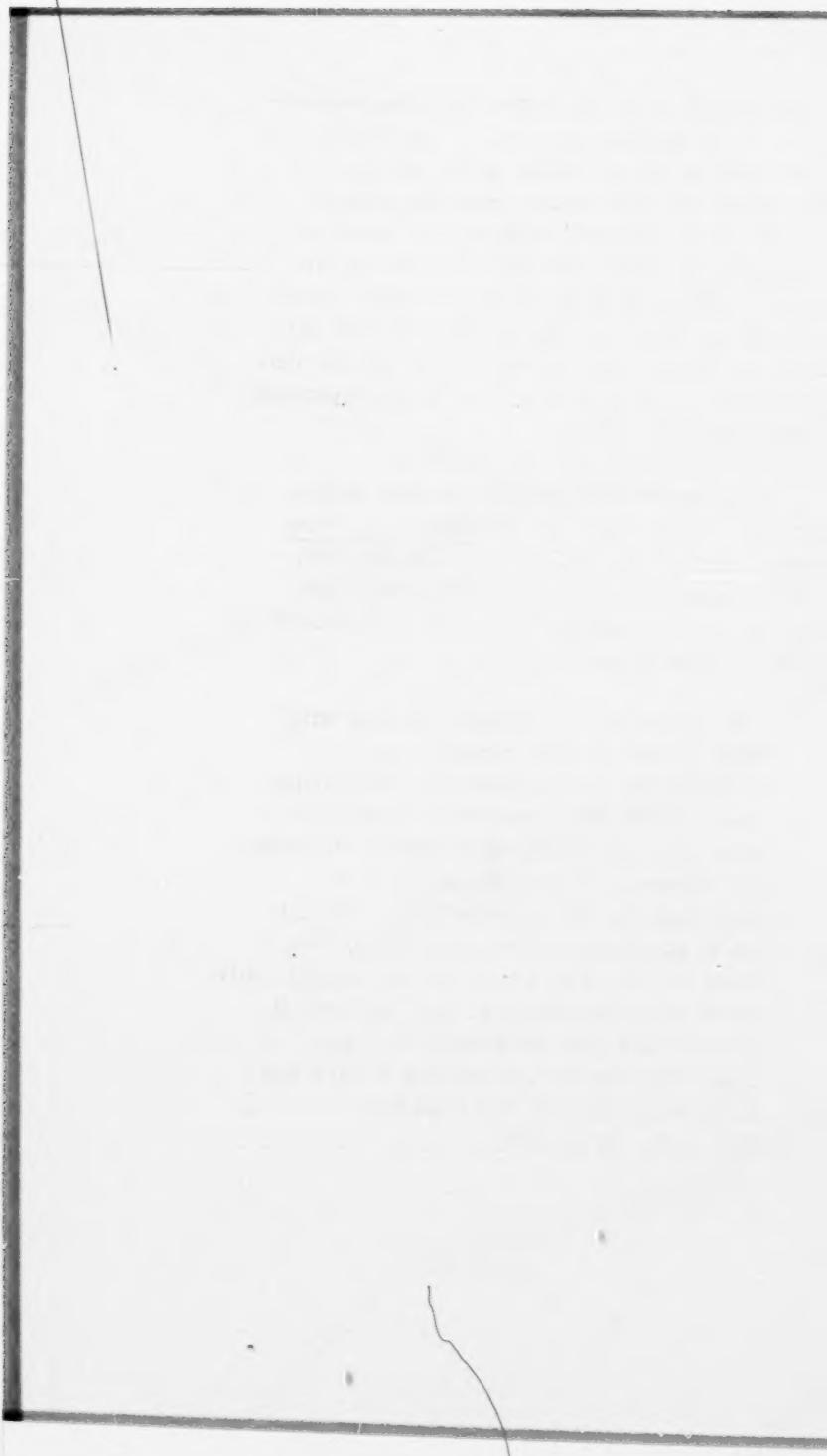

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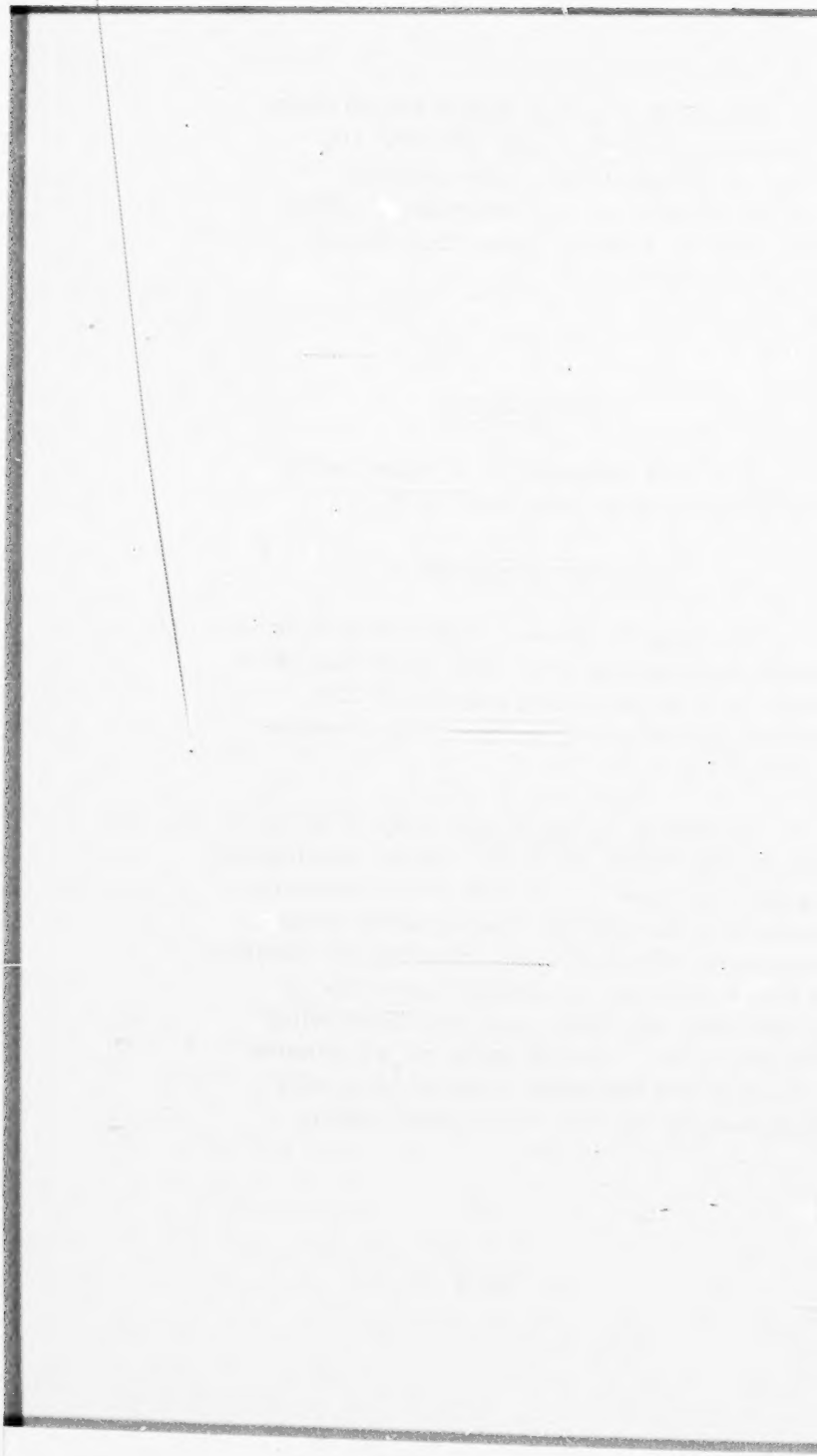

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

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5. That Appellant was released by the sheriff when no written hold was placed against Appellant by the Adult Authority.

6. That I was informed by telephone at a subsequent time that pursuant to the request of a Deputy District Attorney without notice to Appellant or Declarant, the Court below revoked Appellant's bail by an ex parte order.

September 17, 1973.

/s/ Howard E. Beckler
HOWARD E. BECKLER